89-407

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A Professional Corporation,

Petitioners,

v.

STATE OF ALASKA; SUPERIOR COURT for the STATE OF ALASKA, Third Judicial District,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

WEIDNER & ASSOCIATES, INC.
A Professional Corporation
PHILLIP PAUL WEIDNER
Attorney for Petitioners
330 L Street, Suite 200
Anchorage, AK 99501
(907) 276-1200

August 31, 1989

I.

QUESTIONS PRESENTED FOR REVIEW

1. May an attorney be compelled to reveal confidential attorney/client communications to defend himself at the same time he is defending his client for first degree murder where a conflict of interest would force the attorney to violate the Sixth Amendment right to effective assistance of counsel, and the Fifth Amendment right to remain silent and against self incrimination?

2. Whether excessive, non-remedial, civil penalties imposed solely for retributive and deterrent purposes on an attorney constitute punishment for due process purposes such that the sanctions may not be summarily imposed without a prior jury verdict and other constitutional safeguards pursuant to the United States Supreme Court decisions in U.S. v. Halper, 57 U.S.L.W. 4526 (No. 81-1383 May 15, 1989), and Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963), and Bell v. Wolfish, 441 U.S. 5d20, 539 n. 20 (1979)?

3. Where an attorney is fined thousands of dollars for cross-examination while defending a client for first degree murder, does the invidious discrimination of relegating criminal defense counsel to a second class status deny equal protection and due process of law in light of the right to practice law, to effective assistance of counsel, and to cross examination and confrontation since attorneys in civil cases have direct appeal rights to the Alaska Supreme Court from sanctions, while attorneys defending litigants in criminal cases have only a discretionary right of review to the Alaska Supreme Court?

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PHILLIP PAUL WEIDNER and DRATHMAN & WEIDNER, A PROFESSIONAL CORPORATION,

Petitioners,

vs.

STATE OF ALASKA; SUPERIOR COURT FOR THE STATE OF ALASKA, Third Judicial District,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

TO: THE HONORABLE CHIEF JUSTICE WILLIAM H. REHNQUIST AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners; Phillip Paul Weidner and Drathman & Weidner, A Professional Corporation, respectfully pray that a Writ of Certiorari issue to review the final opinion of the Court of Appeals of the State of Alaska entered in this preceeding on November 25, 1988.

II.

OPINION BELOW

The Alaska Supreme Court denied a Petition for Hearing in Phillip Paul Weidner and Drathman & Weidner, A Professional Corporation, Petitioners v. State of Alaska, Respondent File No. S-3186 on May 3, 1989 (Exhibit A in Appendix herewith), in an unreported order. The Court of Appeals for the State of Alaska affirmed the imposition of sanctions, in part, against petitioners, on petitioners' appeal from thousands of dollars in fines levied against petitioners during the defense of Daniel Mozzetti, in Phillip Paul Weidner and Drathman & Weidner v. State of Alaska; Superior Court for the State of Alaska , Third Judicial District, Slip Opinion No. 871, File No. A-420, on November 25, 1988 (Exhibit B in Appendix herewith). The case is reported at 764 P.2d 717. The Court of Appeals denied a Petition for Rehearing on January 5, 1989 (Exhibit C in Appendix herewith).

III.

JURISDICTION

The entry of Final Judgment of the Supreme Court/Court of Appeals of the State of Alaska was effective on May 3, 1989, as reflected by the file stamp on the final order by the Alaska Supreme Court denying a Petition for Hearing in the Alaska Supreme Court No. S-3186 (Exhibit A in Appendix herewith).

A final opinion of the Court of Appeals of the State of Alaska was entered on January 5, 1989 denying petitioners' request for a Rehearing. (Exhibit C in Appendix herewith). Pursuant to Alaska Supreme Court Rules of Appellate Procedure 302 et seq., a timely Petition for Hearing in the Alaska Supreme Court was filed on March 28, 1989. Jurisdiction is invoked under 28 U.S.C. § 1257 (3) and Rules 17 to 20 of the United States Supreme Court Rules of Appellate Procedure. The instant petition is timely filed under Supreme Court Rule 20 since filed within 90 days after the effective date of the Entry of Judgment of the

Alaska Supreme Court and the Alaska Court of Appeals.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to due process, the right to effective assistance of counsel, the right to a jury trial, the right to remain silent and against self-incrimination, and the right to equal protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I Sections 3, 7, and 11 of the Alaska Constitution.

Summary contempt power is authorized by Alaska Rule of Civil Procedure 90, and civil penalties may be authorized under Alaska Rule of Civil Procedure 95.

The case likewise involves the right to review to the Alaska Supreme Court by criminal defense counsel sanctioned in criminal cases. Alaska Statutes 22.05.010, 22.05.015, 22.05.020, and 22.07.020(a)(1)(B).

The text of said constitutional provisions, rules and statutes are set out in the Appendix herewith pursuant to United States Supreme Court Rule 21(f) and 21(k) (Exhibit G in Appendix herewith).

V.

STATEMENT OF THE CASE

Petitioner Phillip Paul Weidner, a private attorney, and a partner in petitioner Drathman & Weidner, A Professional Corporation, was appointed by court order to represent Daniel Mozzetti, also known as Donald Stumpf, with regard to first degree murder since Mr. Mozzetti was indigent. There were consistent allegations made by the prosecution, largely unsupported by the evidence, that Mr. Mozzetti, also known as Mr. Stumpf, had killed one Hui Yi pursuant to an alleged "contract" at the request of one Thomas Shin.[1]

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1. Mr. Mozzetti, in large part due to the severe restrictions on cross-examination and confrontation, and errors with regard to the purported "co-conspirator exception" was convicted after jury trial and sentenced to 99 years

Between July 28, 1983, and September 21, 1983, the court issued numerous purported contempt citations fining Mr. Weidner in an amount in excess of $5,000 and threatening him repeatedly, pursuant to the prosecution's applications, with imprisonment.

Most of the fines were imposed because of the court's insistence that counsel must reveal a "good faith basis" for cross-examination of crucial prosecution witnesses as to their motive for bias. Counsel would refuse to violate confidential communications from Mr. Mozzetti, citing the Sixth Amendment to the United States Constitution and Article I, Section 11 of the Alaska Constitution, and the Fifth Amendment to the United States Constitution and Article I, Section 9

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imprisonment. A Petition for Writ of Certiorari was filed for Mr. Mozzetti in Stumpf v. State, Case No: 88-6719. The Petition for Writ of Certiorari was denied. Mr. Mozzetti is proceeding on his own for Habeas Corpus relief in federal court such that the issues concerning his confidential comments to Mr. Weidner vis a vis the Fifth and Sixth Amendments are not yet moot.

of the Alaska Constitution. The court would then summarily impose contempt citations without affording Mr. Weidner a full and adequate, independent right to defend himself through independent counsel, free from any conflict of interest.

It is vitally important for this court to realize that the applications by the prosecution for sanctions, and the orders by the court, constituted a concerted effort to chill Mr. Mozzetti's rights to confrontation and cross-examination, and further to invade the attorney-client privilege and the right to remain silent and against self-incrimination.

With regard to the central issue, namely the requirement of providing a "good faith basis" for questions on cross-examination, it is important for the court to realize that counsel was faced with the reality that if he provided a basis for his questions in open court, he would alert the prosecution to substantial damaging information regarding his client, said information protected under the applicable constitutional privileges, and that even if

he did so in an ex parte, in camera manner that the court had indicated by its previous actions that confidentiality would not be maintained.

Thus, the central issues in the instant appeal involve attempts to restrict the defendant's rights to confrontation and cross-examination, require disclosure of attorney-client confidences, and impose on the defendant's right to a fair trial through the threat of imprisonment of defense counsel and the threat of an imposition on same of extreme monetary sanctions without affording the attorney full rights to notice, to a hearing, a jury trial, a hearing before a judge, to call witnesses, to confrontation and cross-examination, to discovery, due process, the advice and assistance of independent counsel, and the opportunity to exercise said constitutional and statutory rights without a conflict of interest existing as to the necessity of defending his client and maintaining the integrity of the attorney-client relationship.

These issues are intimately intertwined with the necessity of preserving attorney-client

confidences and the rights to remain silent and against self incrimination under the United States and Alaska Constitutions prior to termination of jeopardy as to both federal and state exposure for first degree murder and for first degree murder pursuant to an alleged contract killing.

A. THE SANCTIONS OF JULY 28, 1983.

The prosecution was attempting to prove that Mr. Mozzetti had purportedly yelled certain instructions to a state witness, one Barry Nix, regarding the witness, Dennis Brown, while they both were in the "holding cells" awaiting court, and to do so they called a trooper, Greg Olson. [Tr. 4051]. In direct violation of Criminal Rule 16, Judge Ripley refused to allow Mr. Weidner access to a written police report from Mr. Olson (who claimed that he recognized Mr. Mozzetti's voice). The court repeatedly refused to allow defense counsel access to the written police report, despite counsel's objection to cross-examining the witness without the police report. [Tr. 4084-4087]. The judge then ordered the cross-examination terminated and

excused the witness. [Tr. 4087]. Mr. Weidner objected to the exclusion of the witness from testimony without access to the police report and to the court allowing the witness to leave town for two weeks. [Tr. 4087].

The jury was excused and Judge Ripley then realized his error and allowed counsel access to the police report [Tr. 4090-4096], and in fact realized that he had summarily violated Rule 16 and released a witness over objection [Tr. 4102-4103]. The court nonetheless fined Mr. Weidner, finding he had violated its direct orders to move on to another area, and specifically denied any application for written motions for sanctions by the prosecution or a hearing before another judge, or an appropriate right to defend. [Tr. 4104-4105].

The second sanction on July 28, 1983, occurred when the witness Flabiano M. Macon was called in an effort to bolster the state's position that Sherry Schroeder was a "babysitter" at Tr. 4243. Mr. Macon maintained that he still owed Ms. Schroeder money for babysitting and had only

known her as a babysitter. At Tr. 4234, he was asked if he had ever met her while she was working at the Moral Destiny. While the court had previously allowed Mr. Weidner to inquire as to other witnesses about the "Moral Destiny", and Ms. Schroeder's activities therein, when Mr. Macon was asked this question the prosecution moved for contempt.

Despite the fact that there had never been any prior specific orders precluding questions about Ms. Schroeder meeting Mr. Macon at the "Moral Destiny," the court found that this was a violation of the order requiring cross-examination as to character evidence to be presented in advance in writing and imposed a fine of $400 refusing an independent hearing and refusing Mr. Weidner's explanation [Tr. 4246] that the questions were relevant as to the ongoing relationship between Mr. Macon and Ms. Schroeder despite the fact that Mr. Macon was contending that they had met over babysitting. The court refused to accept counsel's representations that he had a good faith basis for

asking the questions, and further refused to respect counsel's assertation that it would invade his attorney-client confidences to further reveal the basis. [Tr. 4246, 4247].

B. THE SANCTIONS OF AUGUST 2, 1983.

The prosecution, after extensive argument, obtained an order precluding defense counsel from cross-examining the witness, Barbara Hester, as to statements made by Mr. Mozzetti which the prosecution maintained were exculpatory, citing State v. Agoney, 608 P.2d 762 (Alaska 1980).

Over extensive argument and objection by defense counsel, the court ordered:

> Cross examination can be had only as to those conversations which the state opened up. And any matters suggested to the witness by way of question or otherwise -- and it would only be by question I guess, must relate to the subject matter of those conversations that the state opened up. I believe that's a rule in accord with Agoney and it's not a blanket order.

Tr. 2826-2827.

After cross-examination of Ms. Hester was complete, Mr. Gruenstein moved for sanctions, maintaining that where Mr. Weidner asked Ms. Hester words to the effect, "Were you trying to get him (i.e. Mr. Mozzetti) to make admissions?" and further asked, "Were you successful?" that this violated a protective order. [Tr. 4626]. Further a motion for sanctions was made as to Mr. Weidner's questions about Ms. Hester telling Mr. Mozzetti about the police coming around, alleging that there had been no prior offer of proof at the bench as to the conversations. Mr. Weidner refused to defend himself at the same time as he was defending his client and indicated that he had, in good faith, gone into areas opened up by the prosecution, that the orders were vague, and that there was no specific notice on any application for sanctions. [Tr. 4627]. He further asked for a specific hearing on the charges.

The court denied the applications for specific notice, denied the applications for hearing, and fined Mr. Weidner $100 per incident, for a total of

$200. [Tr. 4628]. Mr. Weidner specifically asked for a hearing and due process rights, and the application was denied. [Tr. 4629].[2]

C. THE SANCTIONS OF AUGUST 17, 1983.

The witness Gerald Parent was a crucial witness against Mr. Mozzetti since he was alleged to have sold Mr. Mozzetti the purported murder weapon. Based upon conversations with Mr. Parent's attorney, Mr. Griffin, Mr. Weidner asked Mr. Parent whether he had motive for bias. Specifically at Tr. 6553, he asked him:

> Q All right. Now, you've testified that they haven't made you any promises in this case?
>
> A That's correct.
>
> Q All right. Hasn't -- hasn't your attorney told . . . [him] . . . that they have told you that they won't prosecute you for hindering prosecution if you tell the same

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2. Sanction No. 5 (August 16, 1983), Sanction No. 7 (August 24, 1983), and Sanction No. 10 (September 13, 1983), were reversed or remanded for further proceedings by the Alaska Court of Appeals so they will not be discussed here.

version to this jury that you told to the grand jury?

The prosecution moved for sanctions, claiming that this was unprofessional conduct. The jury was not allowed to hear the answer to the question, and a hearing was conducted out of the presence of the jury with sworn testimony taken from Robert Griffin. [Tr. 6557-6566]. It was established that Mr. Griffin had, in fact, had a phone conversation with Mr. Weidner; that Mr. Parent had lied to the police in connection with his initial statement [Tr. 6562]; and that Mr. Griffin had told Mr. Parent that he was not going to be prosecuted for perjury if he told the truth [Tr. 6563]. Further, Mr. Griffin conceded at Tr. 6565 that he suspected that the prosecution, in telling Mr. Griffin that his client had to tell the truth, meant that he had to tell the version that he told to the Grand Jury as opposed to the first statement to the police.

Q Do you remember me asking you what do they mean -- that is, what did the prosecution mean when they said that the man had to tell the

truth, and you said, well, I think they mean what he told to the grand jury?

A You asked me -- yeah, I remember you asked me that question, and I -- and I remember saying -- we -- we talked about -- we -- I didn't know what -- what they meant by the truth, but I suspected what they meant.

Q And what did you tell me they suspected -- you suspected they meant?

A I told you I suspected they meant what they were -- what he -- the version he gave to the grand jury.

Tr. 6565 - 6566.

Despite the fact that the court recognized the significance of Mr. Griffin's admission that his client was expected to adhere to the Grand Jury version [Tr. 6570], Judge Ripley summarily fined Mr. Weidner $500 without a further hearing or right to independent counsel, claiming that the conduct was in violation of Evidence Rule 103.

D. THE SANCTIONS OF AUGUST 26, 1983.

The witness William Dublin was called as an "alibi" witness for Donald Smith. Evidence existed

that Smith may have had a motive to kill Yi [Tr. 4786, 4796, and 4798], and that further he may have had foreknowledge of the killing. Further, there was an indication that Mr. Smith may have had knowledge of Mr. Yi's death prior to it actually being reported in the newspapers and/or on the radio so as to indicate he was involved in the murder.

After obtaining certain protective orders over objection with regard to statements made by Mr. Smith to Mr. Dublin alleging hearsay, the prosecution then opened the areas up by calling Dublin as an alibi witness who claimed that he was Smith's roommate and that Smith slept in their home in Kotzebue on the nights of December 29 and 30. Through cross-examination, Mr. Weidner asked how Mr. Dublin could remember the nights in question [Tr. 7992], and Mr. Dublin testified that Mr. Smith had woken him up in connection with a phone call about the killings.

> MR. WEIDNER: He put the witness on the stand. He's got to live with it. He asked him the questions. I can test his perception of why he says it's the 29th and the 30th. Now, he's trying to establish an alibi for this man. I get to cross examine the man.

The prosecution moved for sanctions [Tr. 7995], claiming that Mr. Weidner was attempting to illicit hearsay in violation of the court's orders despite the fact that Mr. Weidner indicated he was simply asking questions, not for the truth of the matter asserted, but to establish the witness's perception as to the dates in question [Tr. 8000, 8004]. Despite a request by defense counsel to clarify the court's orders, the orders were not properly clarified. [Tr. 7997]. Mr. Weidner specifically indicated to the court why he needed to examine as to the statements in order to test the perceptions as to the 29th and 30th. [Tr. 8000]. Nonetheless, the court ordered Mr. Weidner not to refer to any purported hearsay statements. [Tr. 8005]. Further, counsel attempted to examine as to Mr. Smith's

demeanor when told that Mr. Yi had been killed. [Tr. 8016].

Despite the fact that counsel repeatedly approached the bench and made application as to certain questions, e.g. Tr. 8017, et seq., the court ruled that Mr. Weidner had been attempting to use certain questions as a "springboard" into an area that was denied. [Tr. 8042]. Mr. Weidner specifically asked for a separate hearing, separate counsel, the right to defend himself, and specific notice of what questions were objectionable, and the court refused to give said specific notice [Tr. 8042], and imposed sanctions in the amount of $250.

E. THE SANCTIONS OF SEPTEMBER 6, 1983.

The widow of the deceased, Mrs. Yi, was asked by Mr. Weidner as to whether she had consulted an attorney about a divorce action not long before Mr. Yi's death.

Despite the fact that counsel made a specific showing in camera as to the specific representations that had been made to him by another member of the Bar in the Anchorage area to this effect, Judge

Ripley fined defense counsel $500 since counsel refused to reveal the name of the attorney who did so. Note that to do so would have jeopardized counsel's sources, since in all likelihood Mrs. Yi would have taken action against the attorney that revealed the disclosure for purported violations of her own confidences. [Tr. 8760].

F. THE SANCTIONS OF SEPTEMBER 14, 1983.

The witness Roseann Dietz, who gave testimony substantially damaging to the prosecution was arrested on a bench warrant right after her testimony.

Mr. Weidner established this fact in cross-examining Investigator Grimes [Tr. 9661, 9683] and the prosecution moved for $500 in sanctions [Tr. 9676]. The prosecution maintained there was no good faith basis to show that the arrest was in any way linked to her testimony in this case. [Tr. 9676].

Mr. Weidner asked for an opportunity for independent counsel and opportunity to defend himself free from a conflict with his client so he did not have to violate attorney-client confidences and

reveal non-discoverable defense information. [Tr. 9678]. Further, he asked for an opportunity for an ex parte, in camera showing as to his offer of proof with regard to the relevance of the question, and that was likewise denied at Tr. 9679. Moreover, he indicated that it was relevant since it shows that the prosecution was arresting witnesses whose testimony was harmful to them, i.e. Theresa Campbell and Ms. Dietz, and was allowing Mr. Andreas to walk around as a free man on his 162 counts of perjury. [Tr. 9680].

The court, claiming that the question was a violation of the "prior bad act" order as to the witness Dietz, imposed sanctions in the amount of $500. [Tr. 9681].

G. THE SANCTIONS OF SEPTEMBER 21, 1983.

The witness William Hendricks testified to incriminating statements he claimed Mr. Mozzetti made while Mr. Hendricks was incarcerated with him. [Tr. 10402-10405]. Mr. Hendricks was in jail following his arrest on a Class A felony of sexual assault in the first degree and the charge was later

dismissed. [Tr. 10117-118]. While it was clear that the nature of the pending charge affected Mr. Hendrick's perceptions of Mozzetti's statements, and Mr. Hendricks actually admitted same [Tr. 10130], the court granted a protective order precluding not only reference to the nature of the charge but even the fact that he had been jailed on a felony charge. [Tr. 10180-10188].

Mr. Weidner attempted to cross-examine Mr. Hendricks to show the true nature of his conversations with Mr. Mozzetti were simply to the effect that Mr. Hendricks was very unhappy with his public defender representation and he wanted Mr. Mozzetti's assistance in helping him investigate Mr. Hendrick's case. [Tr. 10446]. Judge Ripley ruled that this was some violation of a "prior bad acts" order, and fined Mr. Weidner $500 refusing Mr. Weidner's request for a full hearing, an opportunity to defend himself, and actually fined Mr. Weidner pursuant to a bench conference when he had no opportunity to call witnesses or defend himself. [Tr. 10449].

Mr. Weidner was again fined $500 when he asked whether Mr. Hendricks was released on bail and who posted his bail and how much the bail was [Tr. 10451]. Mr. Weidner specifically objected to being forced to defend himself at a bench conference with no opportunity for independent counsel or to call witnesses, and specifically requested notice; nonetheless, the court fined him. [Tr. 10451].

Given the fact that Mr. Hendricks was evasive as to his true name and what the nature was of the charges for which he was arrested, it was necessary to have assistance in the defense investigation from the woman that initially filed the first degree sexual assault charges against him, one Dawn Marie Bach. When Mr. Hendricks was asked if he knew the woman seated in the courtroom in order to ascertain if she in fact was the same woman that had filed the charges against him to further counsel's investigation, Mr. Weidner was fined $500 despite the fact that he

again asked for independent counsel and a right to independently defend himself. [Tr. 10448].

The total fines imposed against petitioners were approximately $5,000.00 (five thousand dollars). Pursuant to AS 22.05.010, and AS.22.07.020, and the equal protection and due process clauses of the United States and Alaska Constitutions, petitioners appealed directly to the Alaska Supreme Court (see Consolidated Notice of Appeal, Exhibit E in Appendix herewith). Petitioners maintain that they have a right of direct appeal to the Alaska Supreme Court under the Alaska and Federal Constitutions, and any statute interposing a discretionary hurdle via the Alaska Court of Appeals is unconstitutional and a denial of due process and equal protection under the Fourteenth, Fifth, and Sixth Amendments to the United States Constitution, and the comparable provisions of the Alaska Constitution insofar as it applies to defense counsel in criminal cases, and does not apply to defense counsel in civil cases, and further does not apply to civil litigants.

Mr. Weidner also appealed the fundamental issues of an attorney's ability to defend himself and show cause why he should not be held in criminal contempt and/or sanctioned under Civil Rule 95 at the same time he is defending his client, where counsel's defense of himself may force counsel to violate attorney/client confidences, violate the client's right to remain silent and against self-incrimination under the state and federal constitutions, and violate the right to counsel provided by the state and federal constitutions (see Statement of Issues on Appeal, Exhibit F in Appendix herewith).

The Alaska Court of Appeals, in its decision dated November 25, 1988, rejected the federal equal protection and due process claims, based on unequal access to the Alaska Supreme Court by criminal attorneys sanctioned in trial court as opposed to attorneys in civil matters, by claiming that jurisdiction in the Alaska Court of Appeals bears a rational relationship to legitimate goals and that the right of an attorney to practice law is not

entitled to higher scrutiny. (Weidner v. State, 764 P.2d 717, 719-710 (Alaska 1988), (Exhibit B in Appendix herewith).

Furthermore, the Alaska Court of Appeals disposed of Mr. Weidner's arguments that he had a conflict of interest with his client which prevented him from defending himself at the same time that he was defending his client in court in that said defense by Mr. Weidner would violate his client's attorney/client privilege, his Fifth Amendment rights against self-incrimation, and his Sixth Amendment rights to effective assistance of counsel. The Court of Appeals stated:

> If Mr. Weidner had a good faith basis for his questions, or a valid reason for violating the court's restrictions, those justifications should have been presented at the time the sanctions were proposed. There was, therefore, no need for a separate post-trial hearing.(Weidner v. State, supra 764 P.2d at 722, Exhibit B in Appendix herewith).

The Alaska Court of Appeals also held that there was no constitutional right to a jury trial for the sanctions imposed on petitioners. Id.

Mr. Weidner filed a Petition for Rehearing on December 5, 1988, which was denied on January 5, 1989. Subsequently, a timely Petition for Hearing to the Alaska Supreme Court was filed,in which Mr. Weidner again raised the equal protection/due process denial of equal access by criminal defense counsel claim and the conflict of interest as violative of the Fifth and Sixth Amendments, and the constitutional right to a jury trial, independent counsel and other constitutional due process safeguards (Exhibit D in Appendix herewith). The petition was denied on May 1, 1989, and entered on May 3, 1989.

Given the specific objections at trial by petitioners, the specific Notice of Appeal and Statement of Issues at the Court of Appeals level, the specific references in the briefing, and the specific references in the Petition for Hearing to the Alaska Supreme Court as to the validity of the

rationalization by the Court of Appeals, the federal issues regarding the conflict of interest between petitioners and their client and the Fifth and Sixth Amendment defenses, as well as the equal access to the Alaska Supreme Court by criminal defense counsel under the Fifth and Fourteenth Amendments and the right of Mr. Weidner to jury trial and other constitutional protections have been properly preserved.

VI.

ARGUMENT

A. IT DENIES DUE PROCESS AND EQUAL PROTECTION TO INSIST THAT THE ALASKA COURT OF APPEALS HAS APPELLATE JURISDICTION WHILE THE ALASKA SUPREME COURT HAS APPELLATE JURISDICTION TO SIMILARLY SITUATED ATTORNEYS DEFENDING CIVIL LITIGANTS.

It is petitioners' position that the sanctions imposed against petitioners substantially threaten their right to practice law, which is a fundamental right under the United States and Alaska Constitutions, and accordingly, any discrimination between criminal defense counsel and civil counsel cannot be justified under the equal protection and

due process clauses of the Alaska and United States Constitutions absent a compelling basis. See Leeg v. Martin, 379 P.2d 477 (Alaska 1963); Alex v. State, 484 P.2d 677 (Alaska 1971); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976); and Hiber v. Municipality of Anchorage, 611 P.2d 31 (Alaska 1980). Moreover, the more important the right, the greater the burden placed on the state to show that the classification which creates the discrimination has a fair and substantial relation to a legitimate government objective. See State v. Erickson, 547 P.2d 1 (Alaska 1978); Commercial Fisheries Entry Commission v. Apokedak, 606 P.2d 1255 (Alaska 1980); Plas v. State, 598 P.2d 966 (Alaska 1979).

A proper reading of AS 22.07.020 indicates that any direct appeal in this case lies with the Alaska Supreme Court, and further under AS 22.05.015 the Supreme Court should assume jurisdiction. Note that while counsel is being forced to appeal to the Alaska Court of Appeals over objection, his brothers under the Civil Bar may take a direct appeal to the Alaska Supreme

Court. See, e.g. Tobey v. Superior Court, 680 P.2d 782 (Alaska 1983). See also Diggs v. Diggs, 663 P.2d 950 (Alaska 1983); Johansen v. State, 491 P.2d 759 (Alaska 1971); c.f. State v. Browder, 486 P.2d 955 (Alaska 1971); and Surina v. Buckalew, 629 P.2d 969 (Alaska 1981).[3]

The Court's attention is directed to Zobel v. Williams, 475 U.S. 55 (1982); Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1980); San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973); Landesey v. Normet, 405 U.S. 56, 31 L.Ed.2d 36 (1972); Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397 (1976); Missouri v. Lewis, 101 U.S. 22

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[3]. The availability of malpractice insurance, that is, errors and omissions insurance, is a vital one to any private attorney in this day and age, and in fact is required by the Alaska Bar Association before one can be listed on the bar referral service. On application for errors and omissions insurance, it is necessary to list whether one has ever been disciplined by a court, and thus the summary sanctions constitute a clear and present danger to counsel's right to practice law. Thus, Mr. Weidner should have a right of direct appeal to the Alaska Supreme Court.

(1879); Mallett v. North Carolina, 181 U.S. 589 (1981); Colten v. Kentucky, 407 U.S. 104 (1972).

In short, while the above-referenced cases do authorize "two-tier systems" for adjudicating less serious cases, there is no rational basis and certainly no compelling state interest in discriminating against criminal defense attorneys and making them second class citizens merely because they happen to be defending litigants in criminal cases rather than civil cases.

In State v. Huse, 59 P.2d 1101 (Wa 1936), the Washington Court found that "the distinction giving rise to [a] classification must be germane to the purpose contemplated by the particular law and may not rest upon mere fortuitous characteristic or quality of persons, or upon personal designation."

In Brown v. Wood, 575 P.2d 760, 768 (Alaska 1978), modified, 592 P.2d 1250 (Alaska 1979), the plaintiff's showing that she was paid less than male colleagues for comparable work established a prima facie case of discrimination and thus shifted the

burden to the employer to show that the difference in pay was based on other considerations.

Similarly, here there is a showing that attorneys in civil cases have a right to direct appeal to the Alaska Supreme Court from sanctions while attorneys in criminal cases have a barrier of discretionary review interposed on them. Thus, attorneys in criminal matters are necessarily discriminated against by the courts where there is no justification for their separate classification. In fact, criminal cases are often much more serious than civil cases, and the obligation to defend criminal defendants is much more imposing, and thus attorneys representing criminal defendants should be subject to the equal protection of the Alaska Supreme Court.

Throughout its history, the United States Supreme Court has applied different tests to determine whether state legislation violates federal equal protection provisions. In recent history, the United States Supreme Court has applied two tests, commonly called the "compelling state interest

test" and the "rational relation test." The former test was reserved for legislation that affected a fundamental interest (right to travel and privacy) or a suspect classification (race or alienage) while the latter test was applied to all other classifications used in economic or social legislation. In the mid-1970s a middle layer of classification started to appear in Supreme Court decisions which was applied to important, but not quite fundamental, interests or suspect classifications.

In Rinaldi v. Yeaser, 384 U.S. 305, 310 (1966), the court stated:

> This court has never held that the states are required to establish appellate review but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

The civil versus criminal discrimination imposed here involves the fundamental right to practice law, i.e. the right to work and the right to life, liberty, and the pursuit of happiness, and therefore violates federal equal protection

guarantees unless the state can show a compelling state interest for the discrimination. Alternatively, the right involved is an important right to which the intermediate test should be applied. Finally, even if the minimum test is applied, there is no rational relation between the discrimination caused by the interposition of a barrier of discretionary review to criminal litigants and/or their attorneys and the purposes of the courts of appellate review.

When there are no valid distinctions between civil attorneys and criminal attorneys justifying the different appellate rights of review under the federal and state equal protection and due process analysis, the arbitrary banishment of criminal defense counsel to second class status must fail. Isakson v. Rickey, 550 P.3d 359 (Alaska 1976), State v. Erickson, 547 P.3d 1 (Alaska 1978).

B. IT IS INAPPROPRIATE TO FORCE COUNSEL TO DEFEND HIMSELF AT THE SAME TIME HE IS DEFENDING HIS CLIENT, AND FURTHER, IT IS INAPPROPRIATE TO FORCE COUNSEL TO VIOLATE THE CLIENT'S RIGHTS TO REMAIN SILENT AND AGAINST SELF-INCRIMINATION IN ORDER TO DEFND HIMSELF.

The basic thrust of most of the contempt citations was that counsel was being asked to provide a "good faith basis" for asking certain questions on cross-examination, despite the fact that to do so would clearly violate Mr. Mozzetti's rights to counsel and confidentiality of attorney/client communication, rights to remain silent and against self incrimination.

As recognized in Weidner v. Superior Court, 715 P.2d 264 (Alaska App. 1986), in many instances, courts should continue hearings with regard to purported contempt citations until the end of the trial so that counsel is not presented with this "Hobson's choice."

The opinion of the Alaska Court of Appeals that if Mr. Weidner had a good faith basis for his actions, he should have explained them to the judge at that time in defending himself, ignores the

crucial, essential issue in this Petition for Writ of Certiorari. That is, the conflict of interest that exists between the lawyer and his ability to defend himself without violating his client's Fifth and Sixth Amendment rights under the federal Constitution, as well as the corresponding clauses in the Alaska Constitution. In fact, this situation where Mr. Weidner, at the same time, must defend himself while representing his client is analagous to the situation where an attorney represents two defendants.

The authority which follows, addresses the standards upon which conflicts of interest should be reviewed in those conflicts caused by multiple representation. In Glasser v. United States, 315 U.S. 60 (1942), the United States Supreme Court held that an attorney's representation of two co-defendants whose interests were in conflict denied one of the defendants his Sixth Amendment right to effective assistance of counsel.

Thirty-five years later, in Halloway v. Arkansas, 435 U.S. 475 (1978), the United States

Supreme Court clarified Glasser. In Halloway, the trial court appointed the same counsel to represent three co-defendants. The trial court denied defense counsel's trial motions for appointment of separate counsel. Defense counsel claimed that because of confidential information received from co-defendants, he was confronted with a probable risk of representing conflicting interests and could not provide effective assistance for each of his clients. The Supreme Court reversed the trial court's denial of defense counsel's pre-trial motions for the appointments of separate counsel. Citing Glasser, the Supreme Court held that, "whenever trial court improperly requires joint representation over timely objections, reversal is automatic." Id. at 488.

The court also stated that:

> [An] Attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.

Id. at 485.

The Supreme Court noted that: "the defense attorney has the authorization to advise a trial court of conflict of interest." Id. at 485, 486. The court observed that attorneys are considered officers of the court. Id. at 486. The court further added; "When a considered representation regarding a conflict in client's interest comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation." Id.

See also Smith v. Anderson, 689 F.2d 59 (1982). The court found these considerations persuasive in upholding the position that an attorney's request for the appointment of separate counsel on the basis of conflict of interest should be granted.

> In light of the attorney's duty to protect the confidentiality of his attorney/client relation, he need not fully explain [a conflict of interest situation] to the court, merely make the matter known to the court.

United States Ex Rel. Garrett v. Lane, 464 F.Supp. 793, 797 (1979).

> The rule developed by the federal courts in this area afford the trial attorney's judgment near decisive weight when counsel's perception of the conflict is brought to the court's attention.

Smith v. Anderson, supra, 689 F.2d at 62-63.

The Halloway court clarified the extent to which a defendant must show prejudice when he moves for separate counsel prior to trial on the basis of a conflict of interest.

> Under Halloway, courts must presume prejudice to the defendant, regarding of whether prejudice is shown independently, whenever the trial court improperly requires multiple representation over defendant's objection. Thus, Halloway rejected a requirement that a defendant establish prejudice in either of its senses: If a defendant makes a timely objection to the multiple representation, he need not show that a conflict created by the multiple representation reduced his attorney's effectiveness, or caused his conviction.

See Conflicts of Interest in the Representation of Multiple Criminal Defendants;

Clarifying Culyer v. Sullivan, 70 Georgetown Law Journal, 1527, 1533-34 (1982).

Prejudice was presumed in Halloway, even though the testimony of the jointly represented defendants contained no apparent conflicts. The Supreme Court noted several reasons why infraction of the defendant's right to the effective assistance of counsel should never be considered harmless error when a trial court has improperly disregarded defense counsel's representations regarding the existence of the conflict of interest. Halloway v. Arkansas, supra, at 489-91. The court noted that the harm caused by forcing a defendant's counsel to represent clients with possibly conflicting interests is often caused by what the attorney was forced to refrain from doing. In such situations, it is impossible for an appellate court to review a record and intelligently determine the impact of the conflict. An inquiry into a claim of harmless error in such a situation would require "unguided speculation". Id. at 491.

Thus, it was error for the court to require Mr. Weidner to represent himself at the same time that he had a conflict of interest with his own client. Mr. Weidner made timely objections to the trial court's attempt to force him to represent himself at the same time that he was representing his client. He brought to the attention of the court his inability to present his good faith basis for his actions which was necessary to defend himself, but which would have jeopardized his clients own rights under the Fifth and Sixth Amendments of the United States Constitution and corresponding provisions contained within the Alaska Constitution. Thus, Mr. Weidner requested a continuance of the sanctions against him until after the case against his client, independent counsel, and a hearing before a separate judge, so that he would not have to violate his own client's right. His objections and requests were denied by the trial court which summarily sanctioned him and these instances are cited in the statement of the case.

Thus, the court should have respected Mr. Weidner's assertion of a conflict of interest and stayed proceedings against Mr. Weidner until a later date. Up until the present time, Mr. Weidner has never been able to fully present his own defense against the sanctions imposed upon him. Note that the case against this client is still pending, presently by Habeas petition for Fifth and Sixth Amendment violations.

Asking Mr. Weidner to reveal the basis for his good faith belief in pursuing the line of questioning that he did at trial, was an attempt to undermine Mr. Weidner's client's Fifth Amendment right's against self-incrimination and Sixth Amendment rights to the effective assistance of counsel. Revealing that information, even in an in-camera hearing, would:

> Surrender the very protection which the privilege is designed to guarantee.

See Hoffman v. United States, 341 U.S. 479, 486 (1951).[4]

C. PETITIONERS SHOULD HAVE BEEN AFFORDED THE RIGHT TO A JURY TRIAL FOR CIVIL PENALTIES IMPOSED FOR A RETRIBUTIVE AND DETERRENT PURPOSE.

While the Court of Appeals characterized the majority of the sanctions as "civil", the clear intent was punitive and to punish for prior acts. See Wood v. Superior Court, 690 P.2d 1225 (Alaska 1984); Baker v. City of Fairbanks, 471 P.2d 286, 402 (Alaska 1970).

According to Baker, supra, the right to jury trial would extend to "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of

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4. In Maness v. Meyers, 419 U.S. 449, 460 (1975), the court noted that "compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error." Surrendering attorney-client privileges, Fifth Amendment and Sixth Amendment rights under the federal constitution, were surrendering the very protection which these privileges were designed to guarantee.

the term." Id. at 402. "A heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community". Id. at 402, n. 29.

The extreme nature of the fines and sanctions imposed constitute a serious imposition on counsel's professional reputation and ability to practice law. Wherever Mr. Weidner practices, the sanctions in this manner have been repeatedly used by the prosecutor to attempt to convince the court that Mr. Weidner is unethical. In addition, the availibility of malpractice insurance is vital to a practicing attorney, and may be jeopardized by the imposition of sanctions by the court. It is necessary to list whether one has ever been disciplined by a court in seeking to be listed on the Bar Association referral list. This too, presents a clear and present danger to the continued practice of law. Finally, the heavy imposition of fines could prevent an attorney from financially continuing to practice. Where the fines are so heavy that it can result in the loss of a valuable license, it is in effect, a

criminal prosecution which should result in the constitutional right to a jury trial. Alexander v. City of Anchorage, 490 P.2d 910 (Alaska 1971).

The trial judge imposed sanctions on defense counsel solely for retribution and deterrence. In U.S. v. Halper, 57 U.S.L.W. 4526 (United States Supreme Court file No. 87-1833 dated May 15, 1989), the court stated:

> Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves as the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. See. *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not ligitimate non-punitive governmental objectives." *Bell v. Wolfish*, 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or detterent purposes, is punishment,

> as we have come to understand the term. Cf. *Mendoza-Martinez*, 372 U.S., at 169 (whether sanction appears excessive in relation to its non-punitive purpose is relevant to determination of whether sanction is civil or criminal). We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Since the fines imposed against Mr. Weidner fall, under such an analysis, into "punishment" for "deterrence" and "retribution" and have a serious and permanent impact on the right to practice law, a jury trial and other protections should have attached.

VII.

SUMMARY AND CONCLUSIONS

The three questions presented by petitioners via Writ of Certiorari, are important fundamental issues involving important constitutional rights. In this case, the Court of Appeals of the state of Alaska and the Supreme Court of the state of

Alaska have refused to address the important constitutional question regarding a trial court forcing an attorney to defend himself at the same time that he is defending his client where the attorney's defense conflicts with the interest of his client and could violate his client's Fifth and Sixth Amendment rights under the United States Constitution.

The Alaska Supreme Court refused to accept the Petition for Hearing. Mr. Weidner, as an attorney representing a defendant in a criminal case was denied equal access in the appellate process to the Alaska Supreme Court. While civil attorneys have direct access, through a direct appeal from sanctions imposed to the Alaska Supreme Court, Mr. Weidner was only entitled to discretionary review. When an attorney is repeatedly sanctioned and excessive non-remedial, civil penalties imposed solely for retributive and deterrent purposes, the attorney is entitled to a hearing, independent counsel, and the right to a jury trial. Sanctions imposed against an attorney can impact

upon their ability to practice law, and it is invidious discrimination directed against criminal defense attorneys to deny them the same access to the Alaska Supreme Court. All attorneys should have equal access to the Alaska Supreme Court.

Accordingly, the court should grant the Petition for Writ of Certiorari and reverse.

Respectfully submitted this 31st day of August, 1989.

WEIDNER & ASSOCIATES, INC.
A Professional Corporation

By: Phillip Paul Weidner

PHILLIP PAUL WEIDNER
330 L Street, Suite 200
Anchorage, AK 99501
(907) 276-1200
Attorney for Petitioners